IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

_____ Term, 1977

No. 77-758

Paul A. Richter, dba The Body Shop,

Petitioners,

v.

The Department of Alcoholic Beverage Control of the State of California; George Reece, Director of the Department of Alcoholic Beverage Control of the State of California; Dallas Taylor, District Administrator of the Department of Alcoholic Beverage Control of the State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joshua Kaplan, A Member Of
Hertzberg, Kaplan & Koslow

Attorney for Petitioner

HERTZBERG, KAPLAN & KOSLOW
3550 Wilshire Blvd., #1418
Los Angeles, Calif. 90010
Telephone: (213) 381-1121

of Counsel

SUBJECT INDEX

	Page
Jurisdictional Statement.....	1
Opinions Below.....	2
Jurisdiction.....	2
Questions Presented.....	3
Constitutional and Statutory Provisions Involved.....	3
First Amendment.....	4
Fourteenth Amendment.....	4
Twenty-First Amendment.....	4
Department of Alcoholic Beverage Control Rule 143.3.....	5
Statement of the Case.....	7
Reasons for Granting Writ.....	15
I. The Nude Dancing At Issue Before This Court Is Presumed To Be Protected Speech Under The First Amendment To The United States Constitution.....	15
II. The Decision Of The Court Below Represents A Resurrection Of The Discredited Rights/Privileges Distinction.....	17

	Page
III. The Court Of Appeals Has Erroneously Interpreted This Court's Decision In LaRue v. California To Require A Mere Rational Basis Review Of Liquor License Regulations That Restrict The Exercise Of First Amendment Liberties.....	29
APPENDIX "A"..... Opinion of the United States Court of Appeals for the Ninth Circuit, dated August 29, 1977.	
APPENDIX "B"..... Memorandum Decision and Order of the Federal District Court for the Southern District of California denying preliminary injunction and convening the three-judge court, entered on June 3, 1976.	

Page

Elrod v. Burns, 427 U.S. 539, 96 S.Ct. 2673, 2682 (1976)..... 22

Escheat Inc. v. Pierstorff 354 F.Supp. 1120, 1125-26 (W.D. Wis. 1973)..... 30, 31

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 20

Kovacks v. Cooper, 336 U.S. 77 (1949)..... 25

Morrissey v. Brewer, 408 U.S. 471, 481 (1972)..... 20

Perry v. Sinderman, 408 U.S. 593 (1972)..... 15, 19, 20, 22

Peto v. Cook, 364 F.Supp. 1 (S.D. Ohio 1973) cert den 415 U.S. 943 (1974)... 30

Police Dep't of City of Chicago v. Mosley, 408 U.S. 92 (1972)..... 25

Salem Inn, Inc. v. Frank, 501 F.2d 18, 20-21 (2d Cir. 1974)..... 15

Schacht v. United States, 398 U.S. 58 (1970)..... 16, 17

TABLE OF AUTHORITIES CITED

Page

Cases:

Arnett v. Kennedy, 416 U.S. 134,165 (1974)..... 20

Bates v. State Bar of Arizona, __U.S.__, 97 S. Ct. 2691 (1977)..... 37, 38

Bell v. Burson, 402 U.S. 535 (1971)..... 15, 19, 21,

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 395 (1952)..... 16

California v. LaRue, 409 U.S. 109 (1972)..... 13, 15, 16, 17, 22, 24, 30, 33, 34, 39, 40, 41

Clark v. City of Fremont, Nebraska, 377 F.Supp. 327 (D.Neb. 1974)..... 30

Cohen v. California, 403 U.S. 15 (1971)..... 25

Cox v. Louisiana, 376 U.S. 536 (1965)..... 25

Craig v. Boren, 429 U.S. 190, 207 (1976)..... 31, 36

Coran v. Salem Inn, 422 U.S. 922 (1975)..... 15

Page

Sherbert v. Verner, 374 U.S. 398 (1963)..... 20, 23

Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460..... 20

Sugarman v. Dougall, 413 U.S. 634, 644 (1973)..... 20

Winters v. New York, 333 U.S. 507, 510..... 16

Young v. American Mini Theatres, 427 U.S. 50 (1976)..... 24, 25, 26, 27

Rules:

Department of Alcoholic Beverage Control Rule 143.3..... 4, 5, 9, 11, 13, 28, 29, 30, 41

Statutes:

California Business and Professions Code §24200..... 9

California Constitution, Article XX, §22..... 9

Page

United States Code, Title 28, §1254(1)..... 3, 13

United States Constitution, First Amendment..... 4, 18

United States Constitution, Fourteenth Amendment..... 4

United States Constitution, Twenty-First Amendment.... 4

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____Term, 1977

No. _____

_____

Paul A. Richter, dba The Body Shop,

Petitioners,

v.

The Department of Alcoholic Beverage Control of the State of California; George Reece, Director of the Department of Alcoholic Beverage Control of the State of California; Dallas Taylor, District Administrator of the Department of Alcoholic Beverage Control of the State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jurisdictional Statement

Petitioner, Paul Richter, prays that a Writ of Certiorari issue to review the judgment and opinion of the United

States Court of Appeals for the Ninth Circuit, entered August 29, 1977, affirming the decision of the Federal District Court for the Southern District of California's denial of Petitioner's Preliminary Injunction and Application for Convening a Three-Judge Court to determine a substantial constitutional question.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 559 F.2d 1168 (1977) and is attached hereto as Appendix "A". The Order of the Federal District Court for the Southern District of California denying preliminary injunction and convening the three-judge court was entered on June 3, 1976, and appears herein as Appendix "B".

Jurisdiction

The date of the judgment sought to be reviewed is August 29, 1977. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the issue whether a state alcoholic beverage control agency can revoke the individual's license to sell alcohol, in response to that individual's exercise of constitutionally protected speech, raise a substantial constitutional question?

2. Where a liquor licensee challenges the application of a state regulation restricting freedom of expression to conduct falling within the protection of the First Amendment, is the Court to employ the Rational Basis or Strict Scrutiny test in assessing the constitutionality of such application?

Constitutional and Statutory Provisions Involved

This case involves the interplay between the provisions of the First

and Fourteenth Amendments of the United States Constitution and those of the Twenty-First Amendment in the application of California Department of Alcoholic Beverage Control Administrative Rule 143.3.

First Amendment

"Congress shall make no law-- abridging freedom of speech . . ."

Fourteenth Amendment

"Section 1. . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws . . ."

Twenty-First Amendment

"(2) The transportation or importation into any State, Territory or possession of the United States for

delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited."

Department Rule 143.3

Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore, no on-sale license shall be held at the premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

(b) The touching, caressing or fondling on the breasts, buttocks, anus or genitals.

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least 6 feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inadimant objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the

invalid provision or application, and to this end the provisions and this rule are severable."

Statement of the Case

This Petition seeks review of the decision of the United States Court of Appeals for the Ninth Circuit which held that petitioner did not raise a substantial constitutional question contending that respondent Department cannot revoke Petitioner's license on the sale ground that Petitioner presented constitutionally protected nude dancing on premises where liquor is sold.

At all times relevant to this action, Petitioner has operated a neighborhood theatre or night club in the City and County of San Diego, State of California, known as "The Body Shop" and located at 23776 Riley Street, San Diego, California. The Body Shop is offered to such members of the public

who chose to attend entertainment in the form of interpretive jazz dances presented on a raised stage, separated from the members of the audience, and consisting of rhythmic body movements accompanied by popular music which presents the nude human body in an artful, artistic, expressive, and non-obscene manner. Petitioner's establishment has offered for sale and desires to continue to offer for sale both alcoholic and non-alcoholic beverages to its patrons.

Although Petitioner establishment is open to the public, minors are not permitted inside the premises, and individuals employed by petitioner check each patron's identification to ensure that minors do not enter. Performances cannot be viewed from outside the premises, and Petitioner has posted at his entrance a sign which states: "If you would be offended, do not enter."

Petitioner had a license issued by Respondent Department to sell alcoholic beverages at the same establishment. On or about March 18, 1976, an Accusation was filed by the Respondent Department against Petitioner alleging that the grounds for revocation of Petitioner's license exist under Article XX Section 22 of the California Constitution and under Section 24200 of the California Business and Professions Code in that Petitioner allegedly committed violations of the Respondent Department's Rule 143.3 by presenting nothing more than the nude, interpretive modern jazz dance performances herein described. A hearing on said Accusation was duly held and a proposed decision was rendered and adopted by the respondent Department in which Petitioner's license was revoked. The Petitioner then duly appealed to the Alcoholic Beverage Control Appeals Board

the Respondent Department's decision. The Alcoholic Beverage Control Appeals Board affirmed the Respondent Department's decision in an opinion filed on or about March 29, 1977. Petitioner then duly petitioned the Court of Appeal of the State of California, Fourth Appellate District, for a Writ of Review and Stay Order herein. Said Court summarily denied said Petition on May 26, 1977, without any hearing. Thereafter, Petitioner duly petitioned the Supreme Court of the State of California for a hearing and/or Writ of Review and Stay Order. Said Court also summarily denied the Petition without hearing on June 23, 1977. This Court denied certiorari on October 17, 1977.

Meanwhile, in order to preserve Petitioner's right to be heard in the Federal Courts and to avoid the instant Accusation proceeding to a full

revocation of Petitioner's irreparable damage, Petitioner on or about May 14, 1976, instituted an action in the United States District Court for the Southern District of California for declaratory and injunctive relief. In said action, out of which this Petition now arises, Petitioner sought a declaration from said Court that the application of Rule 143.3 to the particular dance performance herein involved constitutes an impermissible invasion of Petitioner's constitutional rights in that Petitioner's license to sell alcoholic beverages was being revoked solely in response to Petitioner's assertion of his First Amendment freedom of speech. Additionally, Petitioner sought a preliminary injunction restraining the Respondent Department from the enforcement of Rule 143.3 to revoke or suspend Petitioner's license pending a final determination of

the constitutional claims raised in Petitioner's Complaint.

On or about June 3, 1976, the Honorable Judge William P. Enright, Judge of the United States District Court for the Southern District of California, ruled on Petitioner's Motion for a Preliminary Injunction and Convention of a Three-Judge Court. Notwithstanding the fact that the instant performances were noted by the Court to amount to "expressive conduct", the Court declined to issue the preliminary relief sought on the grounds that "plaintiff has not shown either a combination of probable success on the merits and probability of irreparable harm or that a balance of hardships tips sharply in his favor." Additionally, the District Court declined to convene a three-judge court to hear Petitioner's constitutional contentions on the grounds that no substantial constitutional question was raised by the

instant Complaint.

Subsequent thereto, Petitioner duly noticed an appeal to the United States Court of Appeals for the Ninth Circuit from the order and decision of the District Court denying Petitioner's Application for a Preliminary Injunction and denying Petitioner's Application for the Convention of a Three-Judge Panel pursuant to 28 U.S.C. §2281. On or about August 29, 1977, said Court filed an opinion which affirmed the decision of the District Court. Said Court determined that this Court's decision in California v. LaRue, 409 U.S. 109 (1972), precludes any constitutional protection for nude dancing in establishments where liquor is served. Although the opinion noted that this Court reserved the question in LaRue of whether future concrete applications of Rule 143.3 might be unconstitutional, it concluded that,

nevertheless, the State can constitutionally prohibit in all cases the serving of liquor in establishments which provide nude dancing regardless of the particular circumstances. Appendix "A" at 8. As such, Petitioner's "privilege" to sell alcoholic beverages is revocable and has been revoked upon his assertion of a First Amendment freedom.

Petitioner contends that the decision of the Ninth Circuit Court of Appeals represents a resurrection of the discredited "rights/privileges distinction," a distinction uniformly and repeatedly repudiated by this Court. Petitioner further submits that the Circuit's decision wrongly applies a mere rational basis test to the constitutional objections raised below.

Petitioner, therefore, respectfully petitions this Court for a Writ of Certiorari to review the opinion of the

Court of Appeals.

Reasons for Granting Writ

The decision below is in conflict with and repugnant to this Court's decision in Perry v. Sinderman, 408 U.S. 593 (1972), and Bell v. Burson, 402 U.S. 535 (1971), in that it sanctions the revocation of a license in response to the assertion of a First Amendment freedom.

I

THE NUDE-DANCING AT ISSUE BEFORE THIS COURT IS PRESUMED TO BE PROTECTED SPEECH UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Nude dancing, unless obscene, is protected by the First Amendment. California v. LaRue, 409 U.S. 108, 116 (1972); Salem Inn, Inc., v. Frank, 501 F.2d 18, 20-21 (2d Cir. 1974), aff'd. in pertinent part sub. nom. Doran v. Salem Inn, 422 U.S. 922 (1975).

Dating at least from the decision of this Court in 1948 in Winters v. New York, 333 U.S. 507, 510 (wherein it was held that the line between informing and entertaining is too elusive to be drawn in terms of First Amendment protection), and confirmed by this Court's decision in Joseph Burstyn, Inc., v. Wilson, 343 U.S. 395 (1952), the principle that "communicative entertainment" is a form of expression protected by the First Amendment has never been doubted. Consonant with this principle, and as indicated in California v. LaRue, supra, 409 U.S. at 118, dance in all forms, no less than any other dramatic stage production, motion picture, book, or magazine, is protected by the First Amendment simply because the First Amendment protects freedom of expression no matter how plebian the setting and whether such be informative or merely entertaining. Schacht v. United States,

398 U.S. 58 (1970).

The Court of Appeals, in the decision below, did not dispute this principle. The Court correctly assumed for purposes of its decision that the dancing at issue here is not obscene and is within the scope of expression protected by the First Amendment.
Appendix "A" at 14 Regardless of this assumption, the Court concluded that the respondent Department could revoke Petitioner's license to serve alcoholic beverages solely because Petitioner scheduled performances of such dancing.

II

THE DECISION OF THE COURT BELOW REPRESENTS A RESURRECTION OF THE DISCREDITED RIGHTS/PRIVILEGES DISTINCTION.

In California v. LaRue, supra, this Court held that Rule 143.3 is facially valid. 408 at 118. This Court

also expressly limited its decision to the issue of facial validity, 408 U.S. at 119 n.5, concluding that the scope of the state's power to regulate alcohol was dependent on the type of dance performance at issue. 408 U.S. at 118. The Court in the decision below, however, held that a State can revoke a license to serve alcohol even though the dance itself is entitled to First Amendment protection.

This decision in its effect resurrects the discredited rights/privileges doctrine. The State, though the respondent Department, is permitted to regulate indirectly that which it could not regulate directly. Although the State certainly could not prohibit a non-obscene dance, since that dance would be entitled to First Amendment protection, it is permitted to remove a license "essential in the pursuit of the

livelihood", Bell v. Burson, supra, 402 U.S. at 539, in response to such a performance.

This Court in Perry v. Sindermann, supra, 408 U.S. at 597, in an opinion authored by Mr. Justice Stewart, summarized the demise of the rights/privileges doctrine.

"For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interests in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech

or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly'. Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible." Accord, Sugarman v. Dougall, 413 U.S. 634, 644 (1973); Arnett v. Kennedy, 416 U.S. 134, 165 (1974) (opinion of Justice Powell, with Justice Blackman concurring); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

This principle has been applied to many governmental benefits, including public employment, Perry v. Sindermann, supra; unemployment compensation, Sherbert v. Verner, 374 U.S. 398 (1963); welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); tax exemptions, Speiser v. Randall, 357 U.S. 513 (1958); and

licenses, Bell v. Burson, supra. In Bell v. Burson, this Court reasoned that revocation of a state-issued license is subject to the same constitutional restraints as is the State's power to deny any other state-created entitlements. The Court stated:

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of the livelihood." Id. at 539.

Consequently, a license could not be revoked without the procedural due process required by the Fourteenth Amendment. It concluded that such a ruling "is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or 'privilege'. Id.

The First Amendment is, of course, a relevant constitutional restraint. Perry v. Sindermann, supra, (in which this Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit). See Elrod v. Burns, 427 U.S. 539, 96 S.Ct. 2673, 2682 (1976) (opinion of Justice Brennan, announcing the judgment of the Court). The Court below, however, although presumably recognizing the existence of this doctrine, concluded that this Court's decision in California v. LaRue, supra, expressly withdrew the license to serve alcoholic beverages from that group of governmental benefits whose denial is subject to constitutional restraint. Petitioner submits that such was not the intent of this Court in its decision in California v. LaRue and that this Court should grant petitioner's Petition for a

Writ of Certiorari in order that it may clarify its intent.

Limitations can, of course, be placed on the exercise of First Amendment freedoms. The denial of a public benefit, however, may not be used by the State for the purpose of creating an incentive to restrict exercise of First Amendment freedoms where it could not restrict these freedoms directly. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert v. Verner, 374 U.S. at 404. Yet, that is exactly what has been done in this case. If petitioner desires to retain his state-issued license to serve alcoholic beverages, he cannot authorize the performance of constitutionally protected dance. If he does authorize such dance, his state-issued license to serve

alcoholic beverages, he cannot authorize the performance of constitutionally protected dance. If he does authorize such dance, his state-issued license to serve alcoholic beverages is denied. California v. LaRue was never intended to permit such a result.

The decision below, however, relies on this Court's recent decision in Young v. American Mini Theatres, 427 U.S. 50 (1976), to support its conclusion that a state may regulate First Amendment expression so long as it proceeds in a reasonable manner and has a rational basis for its enactments. In Young, this Court upheld as constitutional Detroit's zoning ordinances which prohibited the location of an "adult theatre" within 1,000 feet of any two other "regulated uses", including but not limited to adult book stores, bars, and cabarets, or within 500 feet of a residential area. In

the instant action, the Court below construed this Court as holding, among other things, that content-based regulation is constitutionally acceptable. It is submitted that that conclusion is an inaccurate reading of this Court's decision in Young.

Reasonable regulations of the time, place and manner of protected speech, where those regulations are necessary to further significant governmental interest, are permitted by the First Amendment, so long as they remain content neutral. Kovacks v. Cooper, 336 U.S. 77 (1949); Cox v. Louisiana, 376 U.S. 536 (1965); Cohen v. California, 403 U.S. 15 (1971); Police Dep't of City of Chicago v. Mosley, 408 U.S. 92 (1972). It is conceded that the opinion of the Court, authored by Mr. Justice Stevens, questioned the correctness of this principle. See Section III of the Opinion, 96 S.Ct

at 2449-2453. Five members of this Court, however, specifically refused to concur in that portion of the Opinion. Thus, the Ninth Circuit's reliance on that portion of the opinion in concluding that regulation of First Amendment expression can be content-based would seem to be misplaced, and it is left without a rule of law on which to premise its decision.

Moreover, the effect of the regulation at issue in Young, which was of great importance to the decision in that case, is quite different and constitutionally distinguishable from the effect of the regulation in the present case. In Young, the regulation placed a limitation on which adult films may be exhibited, a limitation believed to be relatively insignificant in light of the facts of that case. As Justice Stevens noted:

"[T]he District Court specifically found that '[t]he Ordinances do not effect the operation of existing establishments but only the location of new ones. There are myriad of locations in the City of Detroit which must be over 1,000 from existing regulated establishments. This burden on First Amendment rights in slight' 373 F.Supp. 363, 370 (1974." 96 S.Ct. at 2453 n.35.

The Court noted, however, that:

"[t]he situation would be quite difference if the ordinance had the effect of suppressing or greatly restricting access to lawful speech." Id. (emphasis added)

That latter situation is present in the instant action. Rule 143.3 is not prospective in its effect as was the Ordiance in Young. Licenses issued prior to the enactment of Rule 143.3 are revocable.

More importantly, by prohibiting the sale of alcoholic beverage at any establishment which provides nude entertainment, respondent Department has effectively suppressed constitutionally-protected nude or nearly nude dance at virtually all arenas where such dance could be performed. Public entertainment centers, including opera houses, symphony halls and music centers, as well as nightclubs and bars, sell alcoholic beverages. Rule 143.3 requires the operators of all those establishments to chose between exercising their First Amendment liberties and retaining their licences to sell alcoholic beverages. This situation results in suppression and not an insignificant convenience.

III

THE COURT OF APPEALS HAS ERRONEOUSLY INTERPRETED THIS COURT'S DECISION IN LARUE v. CALIFORNIA TO REQUIRE A MERE RATIONAL BASIS REVIEW OF LIQUOR LICENSE REGULATIONS THAT RESTRICT THE EXERCISE OF FIRST AMENDMENT LIBERTIES.

The Ninth Circuit's opinion disposes of petitioner's constitutional challenge to the application of the Department's Rule 143.3 to his specific dance performances on the grounds that there can be no constitutional objection to such application so long as the rule is reasonably related to the purpose it is intended to further. The Ninth Circuit's analysis is not only inconsistent with decades of First Amendment decisions, it is likewise a disastrously erroneous interpretation of this Court's decision

in LaRue v. California, supra.

It was acknowledged by the Ninth Circuit that in the instant case there was no showing whatsoever that there ever occurred in or near petitioner's premises the "bacchanalian revelries" that the Department sought to prevent by enacting its Rule 143.3. Petitioner has contended, based upon the language of footnote 5 in the LaRue decision, 409 U.S. at 119, that before his liquor license may be constitutionally revoked, there must be a factual determination that the specific dancing was more a form of "gross sexuality" than "communicative expression".

After noting support for petitioner's proposition in several District Court cases, i.e., Clark v. City of Fremont, Nebraska, 377 F.Supp. 327 (D. Neb. 1974), Peto v. Cook, 364 F.Supp 1 (S.D. Ohio 1973), cert. den. 415 U.S. 943 (1974), Escheat, Inc. v. Pierstorff,

354 F.Supp. 1120, 1125-26 (W.D. Wis. 1973), and in the most recent Supreme Court case dealing with liquor licensing, Craig v. Boren, 429 U.S. 190, 207 (1976), the Ninth Circuit's opinion proceeded to dismiss petitioner's argument on the grounds that:

"The focus of our inquiry should not be directed to the restriction of access to the particular form of expression herein, but rather must be directed to the restriction of the viewers access to liquor." 559 F.2d at 1172.

The Court went on to conclude that:

"The Issue" is not whether the nude dancing is so near gross sexuality as to approach obscenity, but whether nude dancing of any sort when performed in establishments serving liquor is sufficiently likely to cause properly prescribed conduct. Thus, the fact that nude dancing here may have been entirely

tasteful is irrelevant, once it is accepted that the state can constitutionally prohibit the serving of liquor in establishments which prove nude dancing." 559 F.2d at 1173.

The central premise underlying the Ninth Circuit's entire analysis is that where alcohol is involved, the state is held to nothing more than a rational basis test even when its regulations restrict the exercise of First Amendment liberties. In the words of the Ninth Circuit, the State can

"Regulate the places where liquor can be served on the basis of the type of entertainment it provides so long as the State proceeds in a reasonable manner and has a rational basis in its enactments." 559 F.2d at 1173.

This conclusion is inconsistent with the entire corpus of First Amendment law, and does not rest upon or is

it mandated by the holding of this Court in LaRue v. California. In LaRue, this Court was concerned with a facial challenge to the Department's Rule 143.3 on the grounds that it overbroadly impinged on the exercise of First Amendment liberties. Without reference to any particularized facts, and without reference to the nature of the specific performances offered by the appellees in LaRue, this Court upheld the Department's rule as a facially valid exercise of the Department's regulatory power. The essence of the LaRue decision, as noted by the Ninth Circuit was that

"The court refused to apply the overbreadth doctrine to the regulations established by the Department even though the literal application of the regulations could, in given situations, affect expression which is protected by the First Amendment." 559 F.2d at 1172.

However, as noted herein above, this Court carefully limited its holding in LaRue by recognizing that "it is possible that specific future applications of [the rule] may engender concrete problems of constitutional dimension . . . We deal here only with the statute on its face." 409 U.S. at 119, note 5.

Considering the posture of the case in LaRue, together with this Court's limiting admonistion in note 5 of LaRue decision, it becomes evident that the thrust of the LaRue decision was the overbreadth doctrine would not be available to litigants challenging liquor license regulations. But the LaRue decision did not hold, nor can it be found deemed to hold, consistent with this Court's work in the First Amendment area, that where liquor is involved, the state's enactments are ipso facto subject to no more than a mere rational basis test.

Were analysis of the Ninth Circuit accepted, that the state is subject only to a rational basis test where its liquor regulations impact fundamental rights, absurd results would swiftly follow. By way of example, petitioner offers for this Court's consideration the following:

1. If the state after due deliberation determines that the probability of antisocial behavior and criminal conduct by inebriated blacks were sufficiently strong, could the state prohibit the sale of alcohol on licensed premises to Americans of African descent?

2. If the state determines that the danger of social disorder and disruption was sufficiently great where alcohol is served on premises where political speeches were given, could the state retract a liquor license where a licensee permits a political speech be given on

his premises?

3. If the state determines that the consumption of alcohol by males in premises where women were also present leads to sexual crimes and other anti-social conduct, could the sale of alcohol in premises that cater to both men and women?

Significantly, this Court only recently addressed a situation not unlike the third example posed above. In Craig v. Boren, supra, 429 U.S. 190, this Court held that the state could not discriminate between men and women as to the age at which either gender may purchase beer. Craig v. Boren makes it absolutely clear that where fundamental rights are involved, restrictions on the sale of alcohol are subject to strict scrutiny, and not the rational basis test employed by the Ninth Circuit in its opinion.

Under the LaRue decision, the overbreadth doctrine is not to be applied to invalidate a facially valid liquor regulation. Granting this does not require the conclusion reached by the Ninth Circuit that in all constitutional challenges to liquor license regulations only a rational basis analysis is to be employed. Rather, as recently explained by this Court in Bates v. State Bar of Arizona, __ U.S.___ , 97 S.Ct 2691 (1977), even where the overbreadth doctrine would not permit invalidating a statute, where the facts of the case are such as to entitle the litigant to claim the First Amendment right that the regulation restricts, the traditional test of strict scrutiny is applicable.

As stated by this Court in Bates, supra:

"In the First Amendment context, the court has permitted attacks on overly

statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected.

". . . The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." ____ U.S. ___, 97 S.Ct. at 2707.

The Court in Bates concluded that the justification for application of overbreadth analysis does not apply in the commercial speech context. 97 S.Ct. at 2707. The Court was then faced with the question of whether the appellants' conduct, the advertisements offered by appellants, were "outside the scope of basis First Amendment protection." 97 S.Ct. at 2708. After concluding that the appellants advertisements were in fact protected, this Court then proceeded to

consider and invalidate the state's regulation against advertising legal services. 97 S.Ct. at 2709.

In LaRue, there was no showing to the Court that any of appellants therein were engaged in providing dance performances that were in fact entitled to First Amendment protection. Appellants in LaRue relied entirely on the overbreadth doctrine. Petitioner submits that the essence of the LaRue decision was that a mere overbreadth challenge to the facial validity of the Department's Rule 143.3 would not require this Court to invalidate the rule, despite its admitted restriction of First Amendment liberties. LaRue did not hold, as the Ninth Circuit erroneously believes, that where a party challenges the constitutional application of the rule to conduct that is admittedly within the protection of the First Amendment, that no more than a weak rational

basis test is to be employed in assessing the constitutionality of that application.

In effect, the Ninth Circuit's opinion has obliterated the careful distinction drawn in LaRue, wherein this Court reserved the possibility that the application of Rule 143.3 to particular factual situations would raise issues of constitutional dimension. Under the Ninth Circuit's analysis, there can be no constitutional issues, so long as the minimal rational basis exists between the contents of the Rule and the conduct sought to be proscribed. It is because the Ninth Circuit has obliterated that distinction that the absurd results cited above follow.

Petitioner does not contest the authority of the state to regulate the consumption of alcohol so as to prevent the "bacchanalian revelries" and "grossly sexual" conduct that brought on the

promulgation of Rule 143.3. But Petitioner strongly submits that this Court would poorly serve the interests of the state no less than those of the First Amendment should it condone the application of said Rule to dancing admittedly devoid of those abhorent characteristics. The question of the constitutional limits of the rule's factual application cannot be decided by summary reference to the "rational basis" of Rule 143.3, in the fashion of the Ninth Circuit's opinion. If it could, this Court's reservation of the possibility of "concrete problems of constitutional dimension" set forth in Note 5 of the LaRue opinion would be utterly meaningless. Manifestly, it was not the intent of this Court in LaRue to authorize any and all applications of Rule 143.3, regardless of the character and content of dance suppressed. It is now incumbent upon this Court to give

instructions to the Circuit Court as to the meaning and limitations of its decision in LaRue.

For the aforesaid reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By: _____
JOSHUA KAPLAN
Attorney for Petitioner

Of Counsel,
HERTZBERG, KAPLAN & KOSLOW
3550 Wilshire Blvd., #1418
Los Angeles, CA 90010
Telephone: (213) 381-1121

APPENDIX "A"

PAUL A. RICHTER dba THE BODY SHOP,

Plaintiff-Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, et al.

Defendants-Appellees.

No. 77-1789

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT.

Aug. 29, 1977

Action was brought by operator of California establishment, which served alcoholic beverages and which offered public performances of nude dancing proscribed by California Department of Alcoholic Beverage Control regulations, to enjoin the revocation of his license and the plaintiff also asked for the convening of a three-judge court. The United States District

Court for the Southern District of California, William B. Enright, J., denied preliminary injunction and request for the convening of a three-judge court, and an appeal was taken. The Court of Appeals, Barnes, Senior Circuit Judge, held that: (1) under United States Supreme Court decision sustaining facial constitutionality of regulations, restrictions on First Amendment rights must be viewed specifically in context of the commercial exploitation of both the expression and the sale of liquor, and (2) operators failed to show probable success on the merits or to raise a substantial constitutional question.

Affirmed.

In view of United States Supreme Court decision sustaining facial constitutionality of California Depart-

ment of Alcoholic Beverage Control regulation proscribing certain types of nude entertainment in liquor establishments in California, whose license was revoked for violation of regulations, failed to demonstrate probably success on merits and to raise a substantial constitutional question in action to enjoin revocation; federal district court properly denied preliminary injunction and request for three-judge court. West's Ann.Cal.Bus.&Prof.Code, §23090.5; U.S.C.A. Const. Amends. 1, 21.

Under the United States Supreme Court decision sustaining facial constitutionality of California Department of Alcoholic Beverage Control regulations proscribing sale of alcoholic beverages at locations having certain types of nude entertainment, First Amendment

rights are indirectly related but only in the sense that they cannot be freely exercised in context of commercial exploitation of both the expression delineated in regulations, which may be protected by First Amendment, and sale of liquor, which is within state's power to control. West's Ann.Cal.Bus.&Prof.Code, §23090.5; U.S.C.A.Const. Amends. 1 21.

Joshua Kaplan, argued, Don Erik Franzen, Hertzberg, Kaplan & Koslow, Los Angeles, Cal., for plaintiff-appellant.

William R. Winship, Jr., argued, San Diego, Cal., for defendants-appellees.

Appeal from the United States

Before BARNES, SNEED, Circuit Judges, and WONG,* District Judge.

BARNES, Senior Circuit Judge:

Appellant operates an establishment in San Diego, "The Body Shop," which serves alcoholic beverages and which offers to the public performances of nude dancing.[1] The California Department of Alcoholic Beverage Control ("the Department")[2] enacted Administrative Rule 143.3 which, inter alia, provides that no liquor license

---

1. According to Appellant's briefs and the pleadings in the record, appellant's establishment is open to adults only. The performances of nude dancing cannot be viewed from outside the premises. A sign posted at the entrance stated: "If you would be offended by nude entertainment, do not come in." A similar sign is posted inside. Performances are presented on a raised stage which is separated from the members of the audience.

2. The Department is a state administrative agency vested by the California Constitution with primary authority for the licensing of the sale of alcoholic beverages in that state. It also has the authority to suspend or revoke any such license if it determines that the continuation of the license would be contrary to public welfare or morals. Art. 20, §22 California Consitution.

shall be held at any premises wherein the live entertainment includes the "displaying of the pubic hair, anus, vulva or genitals."[3] The United States Supreme Court found Rule 143.3 to be

---

3. Rule 143.3 provides, in relevant part:
143.3 Entertainers and conduct. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted. Live entertainment is permitted on any licensed premises, except that:
(1) No licensee shall permit any person to perform acts of or acts which simulate:
(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.
(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
(c) The displaying of the

be valid on its face in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972).

On March 18, 1976, the Department initiated another in a series of administrative proceedings against the appellant for violation of Rule 143.3 (1)(c).[4] Prior to a hearing on the matter, appellant filed an action in the district court below seeking (a) a

---

pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of Subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

4. The appellant had been found in violation of Rule 143.3(1)(c) on three prior occasions by administrative hearing officers. Accusation 43 (4-10-74) Accusation 18981 (11-12-73), and

declaration that the application of the Rule to the appellant's particular situation was an impermissible invasion of his constitutional rights, (b) a preliminary injunction restraining the Department from enforcing the Rule against the appellant, and (c) the convening of a three-judge court to hear the controversy. On June 3, 1976, the district court ruled against a preliminary injunction and against the convening of a

---

Accusation 18386 (7-30-73). See Clerk's Record ("C.R.") at 21. In each case, appellant took an appeal but the Department adopted the hearing officer's proposed decision. Likewise, in each case, a further appeal was taken to the Alcoholic Beverage Control Appeals Board which affirmed the Department's decision. Petitions for writs of review were denied by the California Court of Appeals and the California Supreme Court. Appellant's application for stay pending petition for writ of certiorari in the United States Supreme Court was initially denied by Justice Rehnquist and subsequently by Justice Brennan after the latter presented the matter to the entire Court.

three-judge court. On August 4, 1976, the administrative law judge recommended that appellant's license be revoked. That recommendation was adopted by the Department. On April 29, 1977, the Alcoholic Beverage Appeals Board affirmed the Department's decision. Pursuant to §23090.5 of the California Business and Professions Code, appellant sought review via a writ of mandamus from the California Court of Appeals, but said writ was denied. Likewise, a writ of mandamus was also denied by the California Supreme Court.

Appellant appeals the district court's denial of his prelinary injunction and his application for convening of a three-judge court. We affirm.

I

[1] The basic question raised by this appeal is whether the Supreme

Court's decision in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) precludes any possible viability of appellant's arguments herein. In LaRue, the Court sustained the facial constitutionality of the Department's regulations proscribing certain live and filmed entertainments in establishments holding liquor licenses. Initially, it was noted that, in the public hearings conducted by the Department prior to the issuance of the regulations, there were reports of widespread shocking and illegal sexual activity occurring in or near the "topless" and "bottomless" bars. However, because of its interpretation of the Twentyfirst Amendment, the Court found it unnecessary to decide the issue on the basis of whether the entertainment involved was obscene, and hence not within the protection of the First Amendment, or

was more conduct than expression, and hence could be regulated as a prohibited form of conduct. Rather, the Court held that the broad power to control the sale of liquor granted to the states by the Twenty-first Amendment established a presumption in favor of the validity of the state regulation so long as the regulation was reasonable and rationally related to the furtherance of legitimate state interest. Notwithstanding the above reasoning, the Court did reserve the question of whether future concrete applications of the rules might be unconstitutional. Specifically, the Court stated:

> The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexual-

> ity than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.
>
> Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the inter-

ests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face

violate the Federal Constitution.[5]

5. Because of the posture of this case, we have necessarily dealth with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Seagram & Sons v. Hostetter, 384 U.S. 35, 52 [86 S.Ct. 1254, 1264, 16 L.Ed.2d 336] (1966), is equally in point here: "Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid."

LaRue, supra, 409 U.S. at 118-119, 93 S.Ct. at 397.

In this case, there was never any showing that there ever occurred in or near The Body Shop the "bacchanalian revelries" which the Department sought to prevent by enacting Rule 143.3. Appellant argues that despite the holding of facial constitutionality in LaRue, the courts still have the

responsibility to review the application of Rule 143.3 to specific concrete situations even where the situation is one which is clearly encompassed within the perimeters of the Rule. Thus, although the appellant admits to having nude dancing in his establishment, he contends that before his license may constitutionally be revoked, it must be determined that the nude dancing was more a form of "gross sexuality" than "communicative expression."

Appellant cites several district court cases to support his position that LaRue did not sanction any erosion of the First Amendment protections where the performance did not "partake of gross sexuality akin to a bacchanalian revelry." I.E., Clark v. City of Fremont, Nebraska, 377 F.Supp. 327 (D.Neb. 1974); Peto v. Cook, 364 F.Supp. 1 (S.D. Ohio 1973), aff'd, 415 U.S. 943, 94 S.Ct. 1462, 39

L.Ed.2d 560 (1974); Escheat, Inc. v. Pierstorff, 354 F.Supp. 1120, 1125-26 (W.D.Wis. 1973). Likewise, he points to dicta from a recent Supreme Court decision which held that the strength of the presumption of validity in regulations made pursuant to the Twenty-first Amendment is not sufficient to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. See Craig v. Boren, 429 U.S. 190, 207, 97 S.Ct. 451, 462, 50 L.Ed.2d 397 (1976) wherein it is stated: "... California v. LaRue, 409 U.S. 109, 115 [93 S.Ct. 390, 395, 34 L.Ed.2d 342] (1972), relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communica-

tion,' id. at 118 [93 S.Ct. [390] at 397]."

However, the language in LaRue, supra, 409 U.S. at 118, 93 S.Ct. at 397, clearly states that the Court did sanction a limitation upon where performances of the type described in the regulation could be held even though it recognized that some of those performances would be within the scope of the First Amendment protections.

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments

> that it licenses to sell liquor by the drink."

Indeed, Mr. Justice Rehnquist, the author of the LaRue opinion, in another case involving regulation of topless dancing, described the holding of LaRue in the following manner:

> "Although the customary 'bar room' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118, [93 S.Ct. 390, 397, 34 L.Ed.2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweigh any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program." [Emphasis added].

Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975). See also opinion of Judge Rehnquist in City of Kenosha v. Bruno,

412 U.S. 507, 515, 93 S.Ct. 2222, 2227, 37 L.Ed.2d 109 (1973): "We also held [in California v. LaRue] that regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional."

[2] In LaRue, it is evident that the Court refused to apply the overbreadth doctrine to the regulations established by the Department even though the literal application of the regulations could, in given situations, affect expression which is protected by the First Amendment. Some courts and commentators have viewed the LaRue opinion as ambiguous because it is seemingly inconsistent with the First Amendment's "preferred position" as delineated in such prior Supreme Court decisions as Murdock v. Pennyslvania,

319 U.S. 105, 115, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). See, e.g., Escheat, Inc., supra, 354 F.Supp. at 1126; The Supreme Court, 1972 Term, 87 Harv.L.Rev. 1, 137-138 (1973). However, as emphasized by the Court in LaRue, the focus of our inquiry should not be directed to the restriction of access to the particular form of expression herein, but rather must be directed to the restriction of the viewer's access to liquor. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in certain locations, specifically in the context of the commercial exploitation of both the expression delineated in the regulations, which may be protected by the First Amendment, and the sale of liquor, which is within the state's power to control. Nude dancing, as the type performed in appellant's establishment, is not the

subject of the prohibition, rather it is the sale of alcoholic beverages.

By way of analogy, if it were demonstrated that there was an alarming increase in assaults and other disturbances caused by sports fans who became drunk and disorderly at various large sporting arenas, the state could properly forbid the sale of liquor in the stadiums during athletic events. While such regulation could be said to interfere with the First Amendment rights of the stadium owners and the fans, it seems clear that the subject of the restriction is not the expression -- the athletic contest -- but the sale of liquor on such occasion. The goal of the regulation is not censorship of the expression but the prevention of crime and disorderly conduct which is concomitant with the consumption of liquor in such situations.

In this case, it was shown at the hearings held prior to the promulgation of the rules that a vast amount of various crimes (e.g., rape, prostitution, public indecency, assaults, etc.) was taking place on or near premises wherein the forms of entertainment delineated in the rules occurred. The Department's regulations were a form of prophylactic action to prevent victimizing by, or victimization of, intoxicated patrons of such establishments. The Supreme Court in LaRue found the Department's efforts to be reasonable and this court is bound by that holding.

The recent Supreme Court decision in Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), is also instructive. In Young, the Court upheld as consitutional

Detroit's zoning ordinances which prohibited the location of an "adult theater" within 1000 feet of any two other "regulated uses" (which applied to 10 different kinds of establishments including adult book stores, cabarets, bars, taxi dance halls, and hotels) or within 500 feet of a residential area. An adult movie theatre was defined in terms of whether the films presented were characterized by an emphasis on matter depicting, describing or relating to a specified list of sexual activities or human anatomical areas. Inter alia, the Court held that the regulation of the place where films may be exhibited on the basis of their content did not offend the First Amendment. Thus, the state here could regulate the places where liquor can be served on the basis of the type of entertainment it provides so long as the state proceeds in a reasonable manner and has a rational basis in its enactments.

The appellant is incorrect in his contention that it must initially be determined whether the entertainment is more "gross sexually" than "communicative expression." If it is concluded, as it apparently was in LaRue, that the combination of nude dnancing and alcoholic inebriation increases to an unacceptable level the likelihood of illegal and/or disorderly conduct, the state can properly prohibit the combination of the two. The issue, therefore, is not whether the nude dancing is so near gross sexually as to approach obscenity, but whether nude dancing of any sort when performed in establishments serving liquor is sufficiently likely to cause properly proscribed conduct. Thus, the fact that the nude dnancing here may

have been entirely tasteful is irrelevant, once it is accepted that the state can consitutionally prohibit the serving of liquor in establishments which provide nude dancing.

For the reasons stated, we find that the district court judge did not err in denying the appellant's request for preliminary injunction and the convening of a three-judge court. Given the LaRue, Salem Inn and Young opinions, it is clear that the appellant failed to demonstrate probable success on the merits, William Inglis & Sons Banking Co. v. I.T.T. Continental Baking Co., Inc., 526 F.2d 86, 88 (9th Cir. 1975), and failed to raise a substantial constitutional question, Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 35 L.Ed. 2d 36 (1973). The decision below is AFFIRMED.

On July 11, 1977, appellant filed with this court an emergency motion to stay proceedings pending appeal. This panel refused to grant the stay, and continued the matter until the day of oral argument. For the record, because of the reasons stated above, appellant's emergency motion is likewise hereby DENIED.

* * * * *

APPENDIX "B"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PAUL A. RICHTER, dba THE BODY SHOP,

Plaintiff,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, et al.,

Defendants.

NO. 76-0630-E

MEMORANDUM DECISION AND ORDER

Upon duly considering the oral argument of counsel on May 24, 1976 and upon duly considering the memoranda submitted in support thereof the Court does hereby deny plaintiff's application for a preliminary injunction and deny plaintiff's motion for the convention of a three-judge panel pursuant to 28 U.S.C. §2281.

1. Preliminary Injunction.

Initially plaintiff seeks a preliminary injunction to vacate and annul all prior actions taken by the Department of Alcoholic Beverage Control pursuant to its Rule 143.3 to revoke plaintiff's license to serve alcoholic beverages, and to enjoin future proceedings to effect a revocation of that license. In this action, seeking permanent injunctive and declaratory relief, plaintiff relies principally on the contention that Rule 143.3 is unconstitutional as applied under the First and Fourteenth Amendments of the United States Constitution. He argues that the case of California v. LaRue, 409 U.S. 109, 93 S.Ct. 390 (1972), does not control because that decision dealt solely with the issue whether Rule 143.3 was unconstitutional on its face.

The court finds that plaintiff has not made a sufficient showing to be entitled to the extraordinary relief of a preliminary injunction under either of the two recognized standards. Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975); William Inglis & Sons Baking Co. v. ITT Continental Baking Co. Inc., 526 F.2d 86 (9th Cir. 1975). First, the court is of the opinion that plaintiff's probability of success on the merits is not substantial in light of the holding in California v. LaRue. Although the Court expressly limited its holding to the constitutionality of Rule 143.3 on its face this court doubts that the application of the rule to the expressive conduct in the instant case would create a problem of constitutional dimension. The rule was drafted precisely to cover the actions

with which the dancers in plaintiff's establishment are charged in the revocation proceedings. The specific rule involved herein was held to be constitutional on its face. Moreover, the Supreme Court declared that, under the Twenty-first Amendment, a state agency has "wide latitude" to regulate the operation of licensed premises. It is probable that the enforcement proceedings under Rule 143.3 in the instant case fall within the periphery of that regulatory power.[1/] Second, the importance of the First Amendment rights

---

1. In his dissenting opinion in LaRue, Mr. Justice Douglas states: "Certainly a play which passes muster under the First Amendment is not made illegal because it is performed in a beer garden." Supra, at 121, 93 S.Ct. at 398. See also, Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 fn. 3 (2d Cir. 1974). The majority opinion in LaRue, supra, at 118, 93 S.Ct. 397 clearly disagrees. A play or ballet performed in a theater, not subject to the regulatory power of the Department of Alcoholic Beverage Control,

asserted by plaintiff do not outweigh the rights asserted by the Department under the Twenty-first Amendment. Third, the specter of hardship and irreparable damage contended by plaintiff is muted by the availability of a revocation hearing and its attendant requirements of due process of law. Finally, the court is convinced that plaintiff has not shown either a combination of probably success on the merits and the possibility of irreparable injury or that the balance of hardships tips sharply in his favor.

Accordingly, the court finds that plaintiff has not met his burden in demonstrating the appropriateness of extraordinary relief; the application for a preliminary injunction is denied.

---

may feature non-obscene expression of the type precluded by Rule 143.3.

2. Convention of a Three-Judge Court

Plaintiff's pursuit of permanent injunctive relief in this action includes a motion for the convention of a three-judge court pursuant to 28 U.S.C. §2281. That statute precludes a restraint on the enforcement of a state statute upon the ground of unconstitutionality unless the application for such restraint is determined by a three-judge panel.

Upon a motion to convene a three-judge panel a district court must inquire whether the action raises a substantial constitutional question, whether the compliant at least formally alleges a basis for equitable relief, and whether the case is otherwise within the jurisdiction of the statute. Mandel v.

Hutchinson, 494 F.2d 364 (9th Cir. 1974). Because the court concludes that a substantial constitutional question has not been raised, it is unnecessary to consider the other two prerequisites for convening a three-judge court.

As aforementioned, the court believes that plaintiff's preliminary arguments indicate that it probably will not succeed on the merits under the rule and rationale of California v. LaRue. A state agency has broad authority to regulate the operation of premises that dispense liquor by the drink; on its face Rule 143.3 was held to be a valid exercise of that authority. The precise conduct proscribed by the letter of that rule is the subject of the accusations upon which the recocation proceeding is founded. It is unlikely that any tribunal would

distinguish between the conduct proscribed by the face of Rule 143.3 and that characterized in the accusation filed by the Department in the instant case.[2/] Mindful of the rule that the three-judge requirement under §2281 is a technical one and subject to a narrow construction, Mandel, supra at 365, the court finds that a substantial constitutional question has not been raised and that plaintiff is not entitled to the convention of a three-judge court.

Finally, this court has some concern regarding the applicability of the principle of nonintervention expressed in

---

2. Although the Court in LaRue limited its holding to the facial validity of Rule 143.3, the court believes, as a practical matter, that accepting plaintiff's argument would require a wholesale referral of suspension and revocation proceedings to three-judge panels. Not even the jetty of stare decisis would halt the wave of contentions that each particular application of the Rule 143.3 was constitutionally defective.

Huffman v. Pursue, Ltd., 95 S.Ct. 1200 (1975). Without deciding whether the relief sought by plaintiffs would constitute an impermissible interference with pending state judicial proceedings, the court would express its reluctance to intervene in a dispute for which the state has provided a forum. The precise issues the plaintiff raises herein are pending before a state tribunal, a statutory mechanism designed for that purspose, in a hearing this plaintiff affirmatively requested.

DATED: June 3, 1976.

/s/
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:

Plaintiff

Defendants

* * * * *

PROOF OF SERVICE BY MAIL

(1013, 1013a C.C.P.(2), 2015.5 (C.C.P.))

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

AFFIDAVIT OF SERVICE BY

MAIL BY ATTORNEY

I, JOSHUA KAPLAN, being first duly sworn, say:

That I am and was at all times herein mentioned, a citizen of the United States, employed in the County aforesaid, and over the age of eighteen years; I further say that I am an active member of the State Bar of California, a member of Hertzberg, Kaplan & Koslow, attorneys of record in this case, and an not a party thereto.

My business address is 3550 Wilshire Boulevard, Suite #1418, Los Angeles, California 90010.

That on November 25, 1977, I served the within Petition For Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at 3550 Wilshire Boulevard, Los Angeles, CA 90010 addressed as follows:

WILLIAM R. WINSHIP, JR., Deputy Attorney General, 110 West "A" Street, #600, San Diego, CA 92101

STATE SUPREME COURT, 3580 Wilshire Boulevard, Los Angeles, CA 90010

COURT OF APPEALS, Ninth Judicial Circuit, P.O. Box 42068, San Francisco, CA 94142

UNITED STATES DISTRICT COURT, 940 Front Street, San Diego, CA 92189

By: Joshua Kaplan
JOSHUA KAPLAN

Subscribed and sworn to before me this 25th day of November, 1977.

Janice A. Daggett
Notary Public in and for said County and State.

OFFICIAL SEAL
JANICE A. DAGGETT
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 31, 1981